INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	7
Conclusion	12

CITATIONS

CASES:

Columbia Broadcasting System, Inc. v. *United States*, 316 U.S. 407	10
Mallory Coal Co. v. *National Bituminous Coal Comm'n*, 99 F. 2d 399	8
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U.S. 375	10
Prentis v. *Atlantic Coast Line*, 211 U.S. 210	11
United Gas Pipe Line Co. v. *Federal Power Commission*, 181 F. 2d 796, pending on petition for writ of certiorari, No. 216, this Term	7, 12

STATUTES:

Administrative Procedure Act:	
Sec. 10	16
Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 973, as amended, 49 U.S.C. 401 *et seq.*):	
Sec. 205(a)	9
Sec. 401	10
Sec. 402	10
Sec. 403(a)	9
Sec. 408(b)	9
Sec. 408(e)	9
Sec. 409(a)	9
Sec. 411	9
Sec. 412(b)	9
Sec. 416	9, 11
Sec. 601	9
Sec. 609	10
Sec. 1002(e)	9
Sec. 1005(f)	10
Sec. 1006	6, 7, 8, 9, 10
Sec. 1006(f)	1

Page

Commodity Exchange Act, 7 U.S.C. 8, 9 8
Federal Alcohol Administration Act, 27 U.S.C. 204(h) 8
Federal Power Act:
Sec. 313(b), 16 U.S.C. 825*l* 8
Federal Trade Commission Act, 15 U.S.C. 45(c) 8
Investment Company Act of 1940, 15 U.S.C. 80a-42 8
National Labor Relations Act, 29 U.S.C. 160(e), (f) 8
Natural Gas Act:
Sec. 19(b), 15 U.S.C. 717r(b) 7, 8
Packers and Stockyards Act, 7 U.S.C. 194 8
Public Utility Holding Company Act of 1935, 15 U.S.C. 79x 8
Securities Act of 1933, 15 U.S.C. 77i 8
Securities and Exchange Act of 1934, 15 U.S.C. 78y 8

MISCELLANEOUS:

Civil Aeronautics Board's Draft Release No. 38, issued April 13, 1949, 14 Fed. Reg. 1879 .....3, 11
Civil Aeronautics Board's Economic Regulations, adopted May 5, 1947:
Part 242 5
Part 291 2
Sec. 292.1, 14 C.F.R. (1947 Supp.) 292.1 2
Civil Aeronautics Board's Regulations:
Serial Nos.:
ER-153 5
ER-154 5
14 Federal Register 420 3
14 Federal Register 1895 5

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 228

ARROW AIRWAYS, INC., et al., *Petitioners*

v.

CIVIL AERONAUTICS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 54) is reported at 182 F. 2d 705.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1950 (R. 55). The petition for a writ of certiorari was filed on July 28, 1950. The jurisdiction of this Court is invoked under Section 1006(f) of the Civil Aeronautics Act of 1938, and 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a court of appeals lacks jurisdiction under Section 1006 of the Civil Aeronautics Act of 1938 directly to review regulations of general applicability and prospective effect adopted by the Civil Aeronautics Board pursuant to rule-making procedures.

STATUTE INVOLVED

The pertinent provisions of the Civil Aeronautics Act of 1938 (Act of June 23, 1938, 52 Stat. 973, as amended, 49 U. S. C. 401, *et seq.*) appear in the pamphlet copy of the Act submitted with this brief.

STATEMENT

Petitioners are "large irregular air carriers" who obtained authority to engage in the common carriage of persons by large transport type aircraft between any and all points in the continental limits of the United States, and between any such points and points in territories of the United States by registering with the Civil Aeronautics Board (Board) under the blanket exemption provisions of Section 292.1 of the Board's Economic Regulations adopted on May 5, 1947.[1] The Board's regulations permit these operations subject to the

[1] 14 C. F. R. (1947 Supp.) 292.1. This part has been redesignated and amended from time to time by rule-making methods in various respects not here material and is currently designated as Part 291 of the Board's Economic Regulations. See 14 Fed. Reg. 1879 (R. 23-39).

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limitations, among others, that tariffs be filed and observed for the services offered and performed, and that operations between these points be confined to a highly irregular or sporadic service and should be so represented to the public.

As part of its effort to control and eliminate flagrant tariff violations by these carriers, particularly over selected routes,[2] and their practice of utilizing so-called independent agents who issued their own "exchange orders" or carriers' tickets, often without regard to the tariff rates of the performing carriers, and who held out regular airline service between the same points as agent for several undisclosed irregular air carriers, no one of which acting alone could lawfully provide such regular service, the Board, on April 13, 1949, issued Draft Release No. 38.[3] By this release, the

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[2] The majority of violations committed by these carriers have resulted from operations between New York, Miami, and San Juan; between New York and points on the West Coast, particularly Los Angeles, San Francisco and Seattle; and between Seattle and points in Alaska. The concentration of carriers over these routes has resulted from the desire for or economic necessity of participating in this lucrative "long-haul" traffic.

[3] Also, as part of its endeavors to deal with these problems, the Board has, concurrently with its issuance of Draft Release No. 38, promulgated regulations which, adopted after notice, consideration of written comments, and oral argument, completely revised its exemption regulations (14 Fed. Reg. 1879, R. 23-39). Although notice of revision as proposed was published (14 Fed. Reg. 420, R. 20-22) and copies were sent to all holders of Letters of Registration in accordance with

Board gave notice that it proposed further to amend its regulations *inter alia* (1) to require the large irregulars to reduce in writing and file with the Board their agreements or other arrangements with ticket agencies, brokers, or other passenger traffic soliciting or generating instrumentalities, and to file copies of all charters or leases of aircraft, (2) to require these carriers to issue and preserve tickets and certain other written evidence of transactions in air transportation, and (3) to prohibit them from making agreements or arrangements which would result in the conduct of regular operations between specified points by a

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the Board's established practice, only two of the petitioners availed themselves of the opportunity to submit written comment and none of them appeared in oral argument before the Board.

Under this revision, the validity of which petitioners do not attack in this proceeding, the Board terminated, effective May 20, 1949, the blanket exemption theretofore granted to large irregulars and required these carriers to file application for individual exemptions orders. The regulations also contained "Grandfather" provisions permitting holders of Letters of Registration, including petitioners, to continue operations until determination of their applications for individual exemption. Although the Board had initially proposed to restrict the use of common ticket agents by the large irregulars, the revised regulations did not contain the restriction; the findings accompanying the regulations, however, noted (R. 25, 26):

> A proposal for further amendment of the regulation dealing with this and related devices used to evade the purpose of the regulation is being circulated to the public for comment concurrently herewith.

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carrier or a combination of such carriers or from holding out such service to the public (14 Fed. Reg. 1895, R. 42-45). A press release issued by the Board on April 18, 1949 also stated the substance of the proposed regulation (R. 39-42). None of the petitioners in this case availed themselves of the opportunity to comment upon the proposals contained in the Draft Release.

After consideration of the comments received from interested persons, the Board, on November 4, 1949, promulgated Regulation Serial Nos. ER-153 (R. 46-48) and ER-154 here involved (R. 48-53). Regulation ER-153 amends Part 242 of the Board's Economic Regulation which relates to the content and form of reports required of irregulars; the amendment requires the filing with the Board of all contracts entered into between carriers and ticket agents, and further requires the submission with the carrier's quarterly flight report of all publicity material issued by the carrier during the reporting period (R. 46-48). Regulation ER-154 further amends Part 291 of the Economic Regulations, the general exemption regulation dealing with irregular carriers (*supra,* p. 2, fn. 1); this amendment (1) prescribes the form of tickets to be used by irregular air carriers, (2) provides that passengers should be transported only on the carrier's tickets issued by the carrier or its acknowledged agent, (3) requires that written contracts be entered into with those ticket and

travel agents from whom traffic was accepted, that settlements of accounts between carriers and agents be made only upon written invoice containing certain specified information, and that copies of such contracts and certain other information be filed with the Board, and (4) forbids the carriers from entering into agreements and arrangements whereby regular services were offered or performed between the same points by the combined services of the participating carriers (R. 48-53). These regulations were to be effective December 10, 1949 and applied to the operations of approximately 95 large irregular carriers.

Invoking Section 1006 of the Civil Aeronautics Act of 1938 and Section 10 of the Administrative Procedure Act, petitioners sought review of these regulations by filing a petition in the Court of Appeals for the District of Columbia Circuit (R. 2-5). In their petition, petitioners alleged that the regulations attempt to regulate ticket agents over which the Board is without jurisdiction; that the regulations differed substantially from Draft Release No. 38 and hence that petitioners were not given the notice required by the Administrative Procedure Act; that the regulation involved an "arbitrary, unlawful and improper exercise of [the Board's] rule-making power"; and that the regulations limit the licenses previously granted certain of the petitioners and thus "deprives them in part of vested property rights, without notice

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and hearing, by a proceeding to which [they] were not parties" (R. 3-4). The court below, in a *per curiam* opinion, dismissed the petition stating that the provisions of Section 1006, governing review of the Board's orders "is not sufficiently different from that in the Natural Gas Act to warrant our distinguishing this from *United Gas Pipe Line Co.* v. *Federal Power Commission,* [181 F. 2d 796, decided April 5, 1950]" (R. 54).

ARGUMENT

1. The question presented by the instant case, *i.e.,* whether courts of appeals have jurisdiction directly to review general rules and regulations issued by the Board, is the same as that involved in *United Gas Pipe Line Co.* v. *Federal Power Commission,* pending on petition for writ of certiorari, No. 216, this Term.

The court below was, we believe, justified in holding in the present case that the differences between the review provisions of Section 1006 of the Civil Aeronautics Act and those of the Natural Gas Act were not of sufficient materiality to warrant a different conclusion. It is true that Section 1006 differs from Natural Gas Act's Section 19(b) (15 U.S.C. 717r(b)) in that it provides that the Board shall file with the court a "transcript of the record, *if any,* upon which the order complained of was entered" (italics supplied) and does not specifically provide that the reviewing

court may order the Board to take additional evidence.[4] These differences, we believe, are, however, overbalanced by the fundamental parallelism between Section 1006 and the provisions for review by courts of appeals in various other regulatory statutes, of which Section 313(b) of the Federal Power Act (16 U.S.C. 825 l) and Section 19(b) of the Natural Gas Act are typical,[5] and which, it has become accepted, preclude direct review of general rules and regulations. *Mallory Coal Co.* v. *National Bituminous Coal Com'n,* 99 F. 2d 399, 405-406 (C.A. D.C.). Moreover, the legislative history of the Civil Aeronautics Act does not disclose any discussion of this phase of the review provisions of Section 1006 nor does it there appear that Congress' attention was directed to the question here presented. This absence of con-

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[4] Section 1006 further differs from Section 19(b) in that Section 1006 does not require a person seeking review to have been a party to the proceeding before the agency nor does it make an application for rehearing to the agency a condition precedent to judicial review. The presence of such requirements in the Natural Gas Act, however, merely serve to reinforce the result under that Act without weakening the conclusion here, since these requirements are omitted from virtually all of the review provisions cited in footnote 5, *infra.*

[5] See, *e.g.,* the review provisions of the Federal Trade Commission Act (15 U.S.C. 45(c)); the Securities Act of 1933 (15 U.S.C. 77i); the Securities & Exchange Act of 1934 (15 U.S.C. 78y); the Public Utility Holding Company Act of 1935 (15 U.S.C. 79x); the Investment Company Act of 1940 (15 U.S.C. 80a-42); the National Labor Relations Act (29 U.S.C. 160(e), (f)); the Federal Alcohol Administration Act (27 U.S.C. 204(h)); the Packers & Stockyards Act (7 U.S.C. 194); and the Commodity Exchange Act (7 U.S.C. 8, 9).

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gressional discussion seems to indicate that the review provided in that section was intended to conform to the consistent pattern of review by courts of appeals followed in these other statutes.

Other provisions of the Civil Aeronautics Act buttress this conclusion by differentiating sharply between orders, which are made reviewable under Section 1006, and rules and regulations. Thus, Section 205(a) empowers the Board to issue and amend such "orders" and to make such "rules" and "regulations" as it shall deem necessary to the effective performance of its functions. The Board is authorized to promulgate rules and regulations to be observed by various classifications of air carriers established under Section 416, the section from which petitioners' operating authority is derived. Rules and regulations are specified as the method by which safety and operating standards of general applicability shall be imposed. Section 601. Regulations are required with respect to the filing and posting of tariffs (Section 403(a)), and regulations are contemplated with respect to other similar actions of general applicability and future effect not required to be taken on the basis of a record. On the other hand, the Board in certain instances involving proceedings to which there are named parties is required to act by order.[6] Orders are contemplated in all cases

[6] See, *e.g.*, Sections 408(b), 408(e), 409(a), 411, 412(b), and 1002(c).

in which adjudicatory action is directed to a particular carrier or in the various other determinations required to be made upon the basis of a record,[7] a requirement not imposed in any case in which the Board is authorized to act by rule or regulation. The limited nature of "orders," in contradistinction to rules and regulations, is emphasized by Section 1005(f), which immediately precedes Section 1006, and prescribes that:

> Every order of the [Board] shall set forth the findings of fact upon which it is based, and shall be served upon the parties to the proceeding and the persons affected by such order.

Read in light of these provisions, it would seem that direct review by courts of appeals under Section 1006 is limited to adjudicatory orders entered in a proceeding to which there are designated parties and predicated upon findings made in that proceeding, and that that Section like the review provisions of most regulatory statutes, precludes direct review of general rules and regulations. Cf. *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 384.[8]

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[7] See, *e.g.*, Sections 401, 402 (issuance, amendment, suspension and revocation of certificates and permits authorizing air transportation); Section 609 (amendment, suspension and revocation of airman and other safety certificates).

[8] Cases such as *Columbia Broadcasting System, Inc.* v. *United States*, 316 U. S. 407, are distinguishable, as we have shown in the brief in opposition in No. 216, pp. 15-16, which is hereby incorporated by reference.

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2. Contrary to petitioners' implication (Pet. 2, 4), the regulations here attacked involve not adjudication but rule-making, and consequently no hearing was required prior to the issuance of these regulations, nor are they reviewable at this time under Section 1006 of the Act. Section 416 of the Civil Aeronautics Act, pursuant to which the Board acted in issuing these regulations (R. 45), specifically authorizes it to prescribe operating rules by "regulation" for the various classifications of carriers, such as petitioners, established thereunder.[9] Moreover, the regulations on their face undertake to govern the future conduct of an entire segment of the airline industry,[10] and their promulgation was predicated upon consideration of regulatory policy of future applicability.[11] Such regulations clearly involve rule making, not adjudication based upon the past conduct of any irregular air carrier. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226. Finally, petitioner's implication is predicated on the erroneous assumption that the regulations modified their "license." In

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[9] Petitioners did not even submit comments upon the proposal contained in Draft Release 38, much less request a hearing. See *supra,* p. 5.

[10] There were approximately 140 Letters of Registration outstanding to large irregular carriers when Draft Release 38 was circulated for comment.

[11] As shown in No. 216, pp. 11-13 and fn. 8, neither the Administrative Procedure Act nor the Constitution requires an adjudicatory hearing in these circumstances.

fact, however, no such modification resulted; carriers such as petitioners, are still free to conduct all operations heretofore authorized with the regulations merely prescribing methods by which those operations should hereafter be conducted.[12]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1950.

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[12] As in *United Gas Pipe Line*, we do not suggest that these regulations are completely beyond judicial scrutiny but rather that they are not directly reviewable under Section 1006. See brief in opposition in No. 216, fn. 12, p. 15.

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